Supreme Court, U.S.
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No. 95-75

In The

# Supreme Court of the United States

October Term, 1995

AIDAN ALASTAIR ROBERTSON-AIKMAN,

*Petitioner,*

versus

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

**Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is:

1) Where an individual is convicted of committing fraud by falsely representing a Social Security number in order to obtain credit from a financial institution, and nine months after committing said fraud knowingly writes a bad check upon an account at that same institution and is subsequently convicted for that crime as well, do such convictions arise from a "single scheme of criminal misconduct" for the purposes of 8 U.S.C. Sect. 1241(a)(2)(A)(ii), if both crimes arose as part of an ongoing scheme to finance the same business enterprise?

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**To The United States Court Of Appeals**
**For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT:

Petitioner, Aidan Alastair Robertson-Aikman, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on April 26, 1995.

## OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on April 26, 1995, are reprinted in the Appendix to this Petition at pages App. 1 through App. 2. The order of the United States Court of Appeals for the Fifth Circuit, staying the issuance of its mandate, entered on June 7, 1995, is reprinted in the Appendix at pages App. 3 through App. 4. The decision and order of the Board of Immigration Appeals, filed August 12, 1994, are reprinted in the Appendix at pages App. 5 through App. 13. The decision and order of the Immigration Judge, filed January 31, 1994, are reprinted in the Appendix at pages App. 14 through App. 18.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 26, 1995, affirming the Board of Immigration Appeals' decision dated August 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

## STATUTES INVOLVED

This case involves the following provision of the United States Code:

*8 U.S.C. Sect. 1251(a)(2)(A)(ii)*

> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

## STATEMENT OF THE CASE

### I. Basis for Federal Jurisdiction in the Court of First Instance

Aidan Alastair Robertson-Aikman herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under 8 U.S.C. Sect. 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

### II. Statement of Facts

Mr. Robertson-Aikman, a native and citizen of the United Kingdom, entered the U.S. in legal nonimmigrant status in 1980. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 94-41121, at 2.

On March 27, 1987, Mr. Robertson-Aikman was convicted under 42 U.S.C. Sect. 408(g)(2), for having knowingly, willfully, and with the intent to deceive, falsely

represented a social security number for the purpose of obtaining things of value from another. A.R. at 2. Specifically, by falsely representing a social security number, he had obtained financing from a bank for a land development project and for the purchase of a store. A.R. at 4, 68. The criminal misrepresentation was committed on or before June 18, 1985.

After the bank discovered the fraudulent nature of the social security number, it denied Mr. Robertson-Aikman further credit, and all checks outstanding were returned for insufficient funds. A.R. 4, 70. He had written one such check for one thousand eight hundred dollars from his account in that same bank, in order to pay for supplies for his store. A.R. at 4. On April 21, 1987, he was convicted in state court for theft in connection with that bad check, which was written on March 11, 1986.

## III. Proceedings Below

INS served an Order to Show Cause to Mr. Robertson-Aikman on April 15, 1993, charging him with deportability under 8 U.S.C. Sect. 1251(a)(2)(A)(ii), for having been convicted of two crimes involving moral turpitude not arising from a single scheme of criminal misconduct, and under 8 U.S.C. Sect. 1251(a)(1)(B), for having remained in the country longer than permitted. A.R. at 124-29.

Mr. Robertson-Aikman was found deportable on both charges by an Immigration Judge ("IJ"), who denied his request for a continuance so that his wife could file a visa petition on his behalf. A.R. 23-27. The IJ rejected Mr. Robertson-Aikman's argument that his two convictions

arose from a single criminal scheme, and therefore did not fall within the ambit of 8 U.S.C. Sect. 1251(a)(2)(A)(ii). A.R. 26-27; see Appendix, hereto attached.

On August 12, 1994, the BIA dismissed Mr. Robertson-Aikman's appeal from the IJ's decision. A.R. 2-7; see Appendix, hereto attached. In so doing, it upheld the IJ's denial of continuance, and also agreed that Mr. Robertson-Aikman's crimes did not arise from a single scheme. A.R. 3-5; see Appendix, hereto attached. As to the latter issue, the BIA acknowledged that its own position was more restrictive than those taken by some of the U.S. Circuit Courts of Appeals; these do not include the Fifth Circuit, however, whereunder the present proceedings arose, and the BIA therefore stated that it would not apply to Mr. Robertson-Aikman the more liberal approach taken by other courts. A.R. 4; see Appendix, hereto attached. On April 26, 1995, the Fifth Circuit issued a nine-line decision dismissing Mr. Robertson-Aikman's petition for review, endorsing the BIA's reasoning as "supported by substantial evidence" with no further discussion. See Appendix, hereto attached.

## REASONS FOR GRANTING THE WRIT

As discussed below, at least six U.S. Circuit Courts of Appeals are squarely in conflict over how to define a "single scheme of criminal misconduct" for purposes of 8 U.S.C. Sect. 1251(a)(2)(A)(ii). Such a dispute has long been recognized as a valid ground for granting the writ of certiorari. *McElroy v. United States*, 455 U.S. 642, 643 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368,

373 (1981); *Marks v. United States*, 430 U.S. 188, 189 (1977). This is a longstanding and live controversy that will not die away or be resolved by further litigation in the lower Courts, who have taken their positions firmly and after careful consideration. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983). The statute at issue is a frequent and important source of dispute, as evidenced by the many precedent decisions that have attempted to decipher it over the years. *See, e.g.*, Annot., 19 ALR Fed. 598 (1974), and cases cited below. The situation cries out for Supreme Court intervention.

What follows is a summary of the conflicting positions taken by the BIA and by the U.S. Circuit Courts of Appeals on the "single scheme" issue.

**Board of Immigration Appeals**

The leading BIA decision is *Matter of Adetiba*, Interim Decision 3177 (BIA 1992), wherein the following analysis was set forth:

> [T]he statutory exception refers to acts, which although separate crimes in and of themselves, were performed in furtherance of a single criminal episode, such as where one crime constitutes a lesser offense of another or where two crimes flow from and are the natural consequence of a single act of criminal misconduct.
>
> ( . . . )
>
> [W]hen an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one

> may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct.
>
> ( . . . )
>
> Under this analysis, there would exist a single scheme of criminal misconduct where one crime constituted a lesser offense of another, or where the two crimes flow from and are the natural consequence of a single act of criminal misconduct. Examples would be both possessing and uttering a counterfeit bill, ( . . . ) or where a person breaks and enters into a store with intent to commit larceny and, in connection with that criminal act, also commits an assault with a deadly weapon.

*Adetiba*, slip op. at 5-6 (citations omitted).

The BIA noted that Congress has provided no guidance whatsoever as to its intent in enacting the statute in question. *Id.* at 5. It also acknowledged that some of the federal courts "have, to varying degrees, applied a more expansive interpretation of the language in question." *Id.* at 6 (citations omitted). It refused to follow such precedents, however, outside of their applicable jurisdictions. *Id.* at 7.

In *Adetiba*, an individual had been convicted, in a single criminal proceeding, on fifteen counts of various fraud-related offenses: he had obtained three credit cards by using false names, addresses, and social security numbers, and he purchased various items over a two-year period. *Id.* at 4. Under its above-outlined doctrine, the BIA found that deportability had been established despite the fact that the crimes in question had been

committed using the same modus operandi and pursuant to an elaborate preconceived plan; it reasoned that each occasion that a different card was used to obtain something of value was a separate transaction, and there was opportunity between each occasion for the individual to stop his ongoing enterprise. *Id.* at 9-10.

**First Circuit**

In *Balogun v. INS*, 31 F.3d 8 (1st Cir. 1994), the First Circuit cited *Adetiba* approvingly, although it did not explicitly endorse it in so many words. It discussed its own pre-*Adetiba* precedent in *Pacheco v. INS*, 546 F.2d 448 (1st Cir. 1976), which involved a man who had committed two unlawful entries two days apart from each other, during an extended drunken spree. The Court noted the split in the Circuits. 546 F.2d at 449 ("It comes as no surprise to learn that the courts have run with this ball in various directions."). In ruling in favor of deportability, it stated as follows:

> [A] scheme, to be a "single scheme", (sic) must take place at one time; there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done.
>
> ( . . . )
>
> Our present thinking is that both the purpose of the statute and the use of the adjective "single" point to a temporally integrated episode of continuous activity. When the immediate activity has ended, even though a "scheme" calls for

> future activity a participant has his second chance to make a decision.

*Id.* at 451-52.

In *Balogun*, the First Circuit declined the petitioner's request that it adopt a more expansive reading of the statute based upon intervening decisions from other jurisdictions. 31 F.3d at 9. It cited the BIA's then-recent decision in *Adetiba*, and also cases from other Circuits that had upheld *Adetiba*; it noted further that its own precedent in *Pacheco* had been relied upon by the BIA in *Adetiba*. 31 F.3d at 9.

**Second Circuit**

The Second Circuit takes a more liberal approach, as set forth in *Nason v. INS*, 394 F.2d 223 (2nd Cir. 1968), *cert. denied*, 393 U.S. 830 (1968). *Nason* specifically rejected the "single transaction" theory endorsed by the BIA in *Adetiba*, stating that "[t]he statutory language, 'a single scheme of criminal misconduct,' is not so narrow as a single criminal act or transaction." 394 F.2d at 227 (citations omitted). The Court went on to hold that while a long interval between criminal acts may create a presumption against a single scheme, said presumption may be overcome by evidence of similarity of "intent, motive, purpose, techniques, similarity of victims and the like. . . . " *Id.* In *Nason*, it was held that even a gap of nine months between crimes was not an insurmountable bar to a single scheme finding, although it did create a "strong [negative] inference"; deportability was upheld, however, due to the lack of evidence of the type mentioned above. *Id.* at 226-28.

**Third Circuit**

In *Balogun, supra,* the First Circuit recognized that the Third Circuit was among those taking a more "expansive" view of what constitutes a single scheme for purposes of 8 U.S.C. Sect. 1251(a)(2)(A)(ii). 31 F.3d at 9 (citing *Sawkow v. INS,* 314 F.2d 34 (3rd Cir. 1963)). *Sawkow* involved two convictions, one for receipt of a stolen automobile and another for automobile theft, committed a day apart. The Court, as had the Second Circuit (see above), gave significant weight to the question of similarity of the crimes. It held that given that the crimes were in fact similar, and given the relatively short interval between them, the government had not carried its burden of proof that they did not arise from a single scheme. 314 F.2d at 37-38. *Sawkow* has also been recognized by the Tenth Circuit as taking a more liberal view on the issue in question. *Nguyen v. INS,* 991 F.2d 621, 625 (10th Cir. 1993).

**Fifth Circuit**

The Fifth Circuit has clearly endorsed the BIA's *Adetiba* doctrine. *Animashaun v. INS,* 990 F.2d 234 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 557 (1993); *Iredia v. INS,* 981 F.2d 847 (5th Cir. 1993). Both Fifth Circuit decisions noted the " ' . . . obvious conflict between the [BIA's] longstanding interpretation of the pertinent provision of the statute' and the interpretation by other circuits," but found the BIA's holding to be at least "reasonable" and therefore entitled to deference under *Chevron, U.S.A., Inc. v. National Resources Defense Counsel, Inc.,* 467 U.S. 837

(1984). *Animashaun*, 990 F.2d at 237 (quoting *Iredia*, 981 F.2d at 849).

**Ninth Circuit**

At least since *Wood v. Hoy*, 266 F.2d 825 (9th Cir. 1959), and as reaffirmed as recently as in *Luna v. INS*, 53 F.3d 338 (9th Cir. 1995), the Ninth Circuit has taken sharp issue with the BIA's "single transaction" approach, dismissing it as too restrictive a reading of the statute. *Wood*, 266 F.2d at 830 ("[T]he language of the statute says 'not arising out of a single scheme of criminal misconduct'; it does *not* say 'not arising out of a single criminal *act*." (emphases in original)). In *Wood*, the individual in question (along with three other men) planned two first degree robberies at the same time, and the robberies were later carried out within three days of each other, using the same modus operandi. 266 F.2d at 831. As in *Sawkow*, *supra*, the Court noted the similarities of the circumstances surrounding the crimes and concluded that the government had failed to carry its burden of proof that the crimes did not arise out of a single scheme. 266 F.2d at 832.

In the Ninth Circuit case most often cited on this issue, the focus is on whether the offenses were actually planned together in advance, as they had been in *Wood*. *Leon-Hernandez v. INS*, 926 F.2d 902, 904 (9th Cir. 1991). The Court stated as follows:

> [W]here credible, uncontradicted evidence, which is consistent with the circumstances of the crimes, shows that the two predicate crimes were planned at the same time and executed in

> accordance with that plan, we must hold that the government has failed in its burden to establish that the conviction did not arise out of a 'single scheme of criminal misconduct.'

*Id.* (quoting *Gonzalez-Sandoval v. INS*, 910 F.2d 614, 616 (9th Cir. 1990)).

**Tenth Circuit**

The Tenth Circuit has adopted the BIA's reasoning in *Adetiba. Onwuneme v. INS*, 46 F.3d 1151 (10th Cir. 1995); *Nguyen v. INS*, 991 F.2d 621, 623 (10th Cir. 1993).

## ARGUMENT

**I. The two crimes for which Mr. Robertson-Aikman was convicted arose from a single scheme of criminal misconduct, and therefore his convictions do not lead to deportability under 8 U.S.C. Sect. 1251(a)(2)(A)(ii).**

The position taken by the BIA in *Adetiba*, and by those courts that have endorsed *Adetiba*, is unreasonable and should not be followed in the present matter. The BIA reading, which has been rejected in at least the Second, Third, and Ninth Circuits, violates the plain language of 8 U.S.C. Sect. 1251(a)(2)(A)(ii), which speaks of a single criminal "scheme," not a single act or transaction. *See Wood, supra*, 266 F.2d at 830. Where there is identity or similarity of circumstances underlying separate convictions, and where the crimes in question form part of some type of overarching criminal plan, the single scheme statutory exception to deportability should apply. *See, e.g.,*

*Nason* and *Leon-Hernandez, supra.* A lengthy interval between crimes should not affect the analysis, if the crimes in fact relate to the same scheme. *See Nason, supra,* 394 F.2d at 226-28.

This is a fortiori so because the Supreme Court has long and emphatically held that ambiguities in deportation statutes must be construed in favor of the individual and against the government, given the extremely harsh nature of the deportation penalty. *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948); *see also Pacheco, supra,* 546 F.2d at 449, *Nason, supra,* 394 F.2d at 227, and *Wood, supra,* 266 F.2d at 830 (all citing *Fong Haw Tan*). The BIA's position is also strongly undercut by the fact that it is the government that bears the burden to prove, by convincing and unequivocal evidence, that the crimes in question do not arise from a single scheme. *Nason, supra,* 394 F.2d at 226 (citing *Wood, supra*).

Mr. Robertson-Aikman's uncontradicted testimony showed that his two crimes both involved attempts to receive credit (to which he knew he was not entitled) from the same bank, in furtherance of his scheme to finance business ventures. A.R. 67-72. The first crime involved presentation of false information in order to secure credit from the bank in the first place, so that he could invest in the construction of homes and could acquire a store, all in the same town. A.R. 68. The second crime occurred when he presented a "hot check" drawn on the same bank to buy merchandise for the store he had bought with the credit he in fact did receive from the bank by means of his first crime. A.R. 69-71. Although the crimes were not committed within a short time one from the other, they pertained to the same scheme, and the

Fifth Circuit's decision in proceedings below should therefore be overturned.

## CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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*Attorney of Record for Petitioner Aidan Alastair Robertson-Aikman*

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 94-41121
Summary Calendar

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AIDEN ALASTAIR ROBERTSON-AIKMAN,
Petitioner,

VERSUS

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

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Petition for Review of and Order of
the Immigration and Naturalization Service
(A28 394 538)

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(Filed Apr. 26, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

have concluded that the determination by the immigration judge that Robertson-Aikman had been convicted of two separate and distinct crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, which finding has been affirmed by the Board of Immigration Appeals, is supported by substantial evidence. Accordingly, the Petition for Review of the Order of the Board of Immigration Appeals will be DISMISSED.

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*United States Court of Appeal*

FIFTH CIRCUIT

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NEW ORLEANS, LA 70130

June 7, 1995

TO ALL COUNSEL:

No. 94-41121 – ROBERTSON-AIKMAN V. INS

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(Agency No. A28 394 538)

MANDATE RECALLED AND/OR STAYED
TO AND INCLUDING JULY 18, 1995

The Court has granted the ( ) recall and/or (X) stay of the mandate to the date above. If during the period of the stay we receive notice from the Supreme Court Clerk that a petition for certiorari in that court has been filed, the stay shall continue until final disposition by the Supreme Court. If the Supreme Court denies certiorari, our mandate shall issue immediately under FRAP 41.

Under Supreme Court Rule 19.1, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made until the record is deemed essential by that court.

A copy of the opinion, judgment, or Local Rule 47.6 decision and denial of rehearing are still required by the

Supreme Court as an appendix to your petition. Enclosed are copies of these documents.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ T.J. Thorne
Deputy Clerk

Enclosures
cc: Mr. Aiden Alastair Robertson-Aikman
Mr. Francesco Isgro

MDT-2
Rev. 7/12/94

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A28 394 538 Dallas Date: AUG 12 1994

In re: AIDAN ALASTAIR ROBERTSON-AIKMAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Joshua Turin, Esquire
15851 Dallas Parkway, Suite 740
Dallas, Texas 75248

ON BEHALF OF SERVICE:
James T. Reynolds
District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – In the United States in violation of law

Sec. 241(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(ii)] – Crimes involving moral turpitude

APPLICATION: Continuance of proceedings

In a decision dated January 31, 1994, the immigration judge found the respondent deportable under both section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B), as a nonimmigrant who remained

in the United States longer than permitted, and section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The respondent was ordered deported from the United States to the United Kingdom. He has appealed this decision. The appeal will be dismissed.

The respondent is a 36-year-old, married, native and citizen of the United Kingdom, who entered the United States as a non-immigrant treaty investor in 1980. The record reflects that the respondent was convicted on March 27, 1987, in the United States District Court for the Northern District of Texas for knowingly, willfully, and with the intent to deceive, falsely representing a social security number for the purpose of obtaining things of value from another, in violation of Title 42, U.S.C. § 408(g)(2). He was also convicted on April 21, 1987, in a district court of Denton County, Texas, for theft in violation of section 31.03(4)(A) of the Texas Penal Code. The Immigration and Naturalization Service issued an Order to Show Cause (Form I-221) on April 14, 1993, charging him with deportation under sections 241(a)(1)(B), as a nonimmigrant who remained longer than permitted, and 241(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct.

In seeking a change of venue, the respondent originally admitted his deportability under both charges. At the respondent's request during his subsequent deportation hearing, the immigration judge reconsidered whether the two criminal convictions arose out of a single scheme. Also, at the hearing, the respondent requested a continuance because of ongoing civil litigation and

because of a pending Petition for Alien Relative (Form I-130). The immigration judge denied the continuance and found the respondent deportable on both charges. On appeal, the respondent again argues that his convictions arose out of a single scheme and also that it was an abuse of discretion for the immigration judge to deny the continuance. We find that neither of these contentions have any merit.

We first consider whether the respondent's convictions arose out of a single scheme. Section 241(a)(2)(A)(ii) of the Act provides as follows:

> Multiple criminal convictions. – Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

As we noted in *Matter of Adetiba*, Interim Decision 3177 (BIA 1992), neither the language of the above statutory provision nor the legislative history provides any assistance or insight into what Congress meant by the phrase "single scheme of criminal misconduct." *See Wood v. Hoy*, 266 F.2d 825 (9th Cir. 1959); *Matter of Vosganian*, 12 I&N Dec. 1 (BIA 1966). We have always interpreted this language to mean that when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part

of an overall plan of criminal misconduct. *Matter of Adetiba, supra.* This interpretation recognizes that the statutory language was meant to distinguish cases where there are separate and distinct crimes but they are performed in furtherance of a single criminal episode. *Id.; see Matter of B-*, 8 I&N Dec. 236 (BIA 1958); *Matter of M-*, 7 I&N Dec. 144 (BIA 1956); *Matter of J-*, 6 I&N Dec. 382 (BIA 1954); *Matter of Z-*, 6 I&N Dec. 167 (BIA 1954); *Matter of D-*, 5 I&N Dec. 728 (BIA 1954).

Under this analysis, there would exist a single scheme of criminal misconduct where one crime constituted a lesser offense of another, or where the two crimes flow from and are the natural consequence of a single act of criminal misconduct. Examples would be both possessing and uttering a counterfeit bill, *Matter of D-, supra,* or where a person breaks and enters into a store with intent to commit larceny and, in connection with that criminal act, also commits an assault with a deadly weapon. *Matter of D-, supra; see also Matter of B-, supra.*

While some circuit courts have adopted a more expansive view of what constitutes a single scheme, outside of those circuits we continue to apply the test outlined above. The Fifth Circuit, where this case arises, has supported our interpretation of the law. In *Iredia v. INS,* 981 F.2d 847 (5th Cir. 1993), the court held that a single scheme is the execution of all elements of a crime and another scheme is the execution of another set of elements. Citing *Matter of D-, supra,* the court noted that the crimes may be similar in character but to be a single scheme they must flow from and be the natural consequences of a single act.

The respondent's convictions do not meet this test. His first conviction, in Federal court, involved what appears to be a major bank fraud, obtaining financing for a land development deal and the purchase of a store. According to the indictment, the respondent's fraudulent acts, using a false social security number to obtain things of value, took place on or around February 18, 1985, and June 18, 1985. When the bank discovered the fraud, it denied respondent further credit and the respondent was arrested. This resulted in his first conviction on March 27, 1987. On March 11, 1986, due to his denial of credit, the respondent decided to pay a bill for supplies for his store with a check for $1,800 that he knew would not be honored. This resulted in his second conviction.

We find these two criminal acts to be separate and distinct. Not only do we find that the respondent's previous scheme was terminated by the denial of credit and his arrest, but, most importantly, he had already accomplished his goal of obtaining the financing for the land development and store. His second offense is not a lesser included offense of the first, nor did it any way further the criminal enterprise of the first. While it could be argued that the acts are connected because they both further the operation of the store, the acts do not amount to a single scheme. He may have felt it necessary to write a bad check because he lost credit with the bank, but this act, 9 months after his previous fraudulent acts, was a separate criminal scheme. The bad check was in no way necessary to obtain the original financing. *See Pacheco v. INS*, 546 F.2d 448 (1st Cir. 1976) (single scheme "point[s]

to a temporally integrated episode of continuous activity"; noting that a second scheme occurs when the criminal is given a second chance not to pursue the criminal activity); *Nason v. INS*, 394 F.2d 223 (2nd Cir. 1968) (holding that a second scheme was begun when a similar act was committed after the respondent had obtained all he wanted, stopped his activity, and then started again after a 9 month interval). As we commented in *Matter of B-, supra*, an intent to make a living by criminality does not make separate unrelated acts a single scheme.

The immigration judge was also correct in his denial of the respondent's request for a continuance. On appeal, the respondent lists four grounds for a continuance. One of these is that he was denied an opportunity to withdraw his admission of deportability and argue the issue of whether his acts constituted a single scheme. This has no bearing on the continuance and, as noted above, the question of whether the respondent's criminal acts arose from a single scheme was decided by the immigration judge and now by us on appeal. The other grounds for the continuance are inter-related and concern his previous marriage. He argues that a continuance was appropriate because his estranged spouse was dying and under the circumstances he was unable to marry his current wife and file a Petition for Alien Relative (Form I-130) until his first wife passed away. And, finally, he argues that a continuance should have been granted because he is involved in a civil suit over the disposition of the estate of his deceased wife.

At the outset, we note that once the Service has chosen to initiate proceedings and to follow them through to a conclusion, the immigration judge must

execute his duty to determine whether the deportation charge is sustained by the requisite evidence. *Matter of Quintero,* 18 I&N 348 (BIA 1982); *Matter of Yazdani,* 17 I&N Dec. 626 (BIA 1981). Also, the Service in this case is simply complying with the law. Deportation proceedings are to begin as expeditiously as possible after the date of a conviction. Section 242(i) of the Act, 8 U.S.C. § 1252(i). As a practical matter, we have found that the purpose of this statute is circumvented if deportation proceedings, once properly initiated by the Service, are unduly delayed by the immigration judge. *Matter of Silva-Rodriguez,* Interim Decision 3168 (BIA 1992). It is, however, within the discretion of the immigration judge to grant a continuance if "good cause" is shown. 8 C.F.R. § 3.27; *Patel v. INS,* 803 F.2d 804 (5th Cir. 1986); *Matter of Siburn,* 18 I&N Dec. 1354 (BIA 1983).

In *Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978), we held that it was within the discretion of an immigration judge to reopen or continue a deportation hearing where an alien has filed a visa petition and an application for adjustment of status. While not establishing an inflexible rule, we stated that a motion to reopen or continue the proceeding should be granted where the petition and application appeared prima facie approvable. However, we modified this view in *Matter of Arthur,* Interim Decision 3173 (BIA 1992). In that decision, we noted that Congress had clearly created a presumption that marriages entered into after the commencement of exclusion or deportation proceedings are fraudulent.

Both *Matter of Garcia, supra,* and *Matter of Arthur, supra,* involved situations where the respondent had

already filed his visa petition and application for adjustment of status. In the instant case, the respondent has alluded to a visa petition having been prepared, but at no time has he specifically alleged, much less documented, that he in fact ever had a visa petition filed on his behalf. It would therefore be inappropriate for the immigration judge to continue the proceedings based on these precedents, where no visa petition is shown to have ever been filed. The circumstances concerning the respondent's delay in filing his petition, a delayed marriage to his current wife because of pending divorce proceedings with his previous wife, who was dying, are not entirely clear from the record. Even considering the situation as portrayed by the respondent, we see no reason to depart from our previous decisions. Additionally, even if the respondent had filed earlier, in *Matter of Arthur, supra*, we stated we will decline to grant a motion to reopen proceedings for a visa petition based on a marriage that falls within the ambit of sections 204(g) and 245(e) of the Act. Respondent's marriage, taking place after the commencement of the deportation proceedings, falls within the scope of this statement and our holding applies equally to motions for continuances. Again, we emphasize that once prosecution has begun by the Service, the immigration judge is correct in seeing the proceedings through as expeditiously as possible. Section 242(i) of the Act. We agree with the immigration judge that good cause for a continuance had not been established.

Finally, as noted by the immigration judge, the respondent's need to be in the United States for the civil suit over his late wife's estate is not something properly considered in a request for a continuance. Rather, such a

request should be presented to the district director in an application for a stay of deportation. 8 C.F.R. § 243.4. We find this to be the case for the reasons outlined in the preceding paragraph. Once proceedings have begun, the immigration judge should reach a decision as expeditiously as possible. *Matter of Silva-Rodriguez, supra; Matter of Quintero, supra; Matter of Yazdani, supra; Matter of Kotte,* 16 I&N Dec. 449 (BIA 1978). We find no merit to any of the respondent's contentions. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ Mary Maguire Dunne
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Dallas, Texas

File No.: A 28 394 538 January 31, 1994

| | | |
|---|---|---|
| In the Matter of<br><br>AIDAN ALASTAIR ROBERTSON AIKMAN<br><br>Respondent | ) | IN DEPORTATION PROCEEDINGS |

CHARGE: Section 241(a)(1)(b) of the Immigration and Nationality Act; nonimmigrant remained for a longer period of time than permitted. Section 241(a)(2)(a)(ii) of the Immigration and National [sic] Act; one who has at anytime [sic] after entry been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS: Termination of proceedings, in the alternative continuance of proceedings.

ON BEHALF OF RESPONDENT:
Joshua Turkin, Esq.

ON BEHALF OF SERVICE:
James Reynolds, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36 year old married male, native and citizen of the United Kingdom, Great Britain and Northern Ireland who last entered the United States at or near New York, New York on or about January 15, 1980 as

a nonimmigrant treaty investor authorized to remain in the United States for a period of not to exceed one year. On April 14, 1993 the Immigration and Naturalization Service issued an Order to Show Cause charging that the respondent would be deportable from the United States under the provisions of Section 241(a)(1)(b) of the Immigration and Nationality Act for after entry to the United States as a nonimmigrant remaining for a longer period of time than permitted and Section 241(a)(2)(a)(ii) of the Act for after entry to the United States having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

The respondent with counsel admitted the truth of all factual allegations on his Order to Show Cause and conceded deportability under both of the listed charges. The case was subsequently transferred on change of venue from the Immigration Court in Harlingen, Texas to the Immigration Court in Dallas, Texas where the respondent with new counsel appeared and indicated that he does not believe that he was eligible for any form of relief from deportation, including the only previously identified form of relief that is registry pursuant to Section 249 of the Immigration and Nationality Act, but requested that he be allowed to withdraw his concessions of deportability under Section 241(a)(2)(a)(ii) of the Act by reason of his convictions relating to a single scheme of misconduct and further that he be granted a continuance of the proceeding for the purpose of developing avenues for relief that he might be able to acquire given time to develop various equities in the United States.

Counsel also argued that the respondent was involved in ongoing civil litigation that would justify continuing the case.

The request for a continuance was denied on the ground that the ongoing civil litigation would not be a proper basis for a discretionary continuance of a deportation proceeding, but rather should be presented to the Immigration and Naturalization Service for the purpose of acquiring either a stay of deportation or order of supervision. And further, on the ground that the development of future applications for relief and equities upon which to base those applications would once again not be a proper ground for a discretionary continuance of a deportation proceeding. However, evidence was taken on the issue of deportability since the respondent was not withdrawing admission to a factual allegation on the Order to Show Cause, nor contesting the convictions which were presented against him (Exhibits 2 and 3), but presenting evidence and legal argument relating solely to the issue of whether or not the two crimes involving moral turpitude of which he was convicted did or did not arise out of a single scheme of misconduct.

The respondent has testified in his own behalf indicating that he committed his federal offense for the purpose of obtaining credit to which he was not otherwise entitled and committed the state offense after such credit was cut off for the purpose of meeting bills due when the credit was no longer present.

I note that the state offense relates to a matter of theft and that an element of the offense be that the person convicted did then and there "intentionally" appropriate

property without the effective consent of the owner and "with intent" to deprive the owner of the property (Exhibit 3 Indictment). I therefore find it clear from the indictment presented to which the respondent has plead guilty that at the time he wrote checks on the account he knew that they would be returned not sufficient funds [sic]. I therefore find any relationship between the establishment of the account and the credit that it contained or whatever arrangements had been made with the bank sufficiently removed from the respondent's further action in writing checks for the purpose of intentionally depriving someone of their property to sustain the charge of deportability as one convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. I believe it is clear here that the respondent's state court charge was not a necessary part of the federal conviction and that the respondent is clearly deportable under Section 241(a)(2)(a)(ii) of the Immigration and Nationality Act based upon the two convictions of record (Exhibits 2 and 3) and that the record does establish such deportability by competent evidence that is clear, convincing and unequivocal.

The deportation charges both having been sustained and the request for a further continuance to develop applications for relief having been denied, and there being no applications for relief currently pending before the Court, the respondent having been presented opportunity to present an application for registry pursuant to Section 249 of the Immigration and Nationality Act during the course of the proceedings and not having done so, the following order must therefore enter:

## ORDER

IT IS ORDERED that the respondent be deported from the United States to the United Kingdom of Great Britain and Northern Ireland, country designated by him, on both charges contained in the Order to Show Cause.

/s/ Gary Burkholder
GARY BURKHOLDER,
Immigration Judge

Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

No. 95-75

# In the Supreme Court of the United States

OCTOBER TERM, 1995

AIDAN ALASTAIR ROBERTSON-AIKMAN, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

## QUESTION PRESENTED

Whether the Board of Immigration Appeals erred in concluding that petitioner was deportable under Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. IV 1992), which provides that an alien is deportable if he is convicted of two or more crimes involving moral turpitude, "not arising out of a single scheme of criminal misconduct."

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 95-75

AIDAN ALASTAIR ROBERTSON-AIKMAN, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the judgment is noted at 53 F.3d 1281 (Table). The decisions of the Board of Immigration Appeals (Pet. App. 5-13) and the immigration judge (Pet. App. 14-18) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 26, 1995. The petition for a writ of certiorari was filed on July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, a native and citizen of the United Kingdom, entered the United States in 1980 as a non-immigrant treaty investor. Although he was authorized to remain in the United States for only one year, he remained in this country after that year expired. Pet. App. 6, 15.

In 1985, petitioner sought financing to develop real estate in Texas and to operate a convenience store. On two occasions he applied to the Bank of the Southwest for a line of credit, using fictitious social security numbers. Pet. App. 9; Admin. Rec. 68-69, 74. Those fraudulent acts took place on or about February 18, 1985, and June 18, 1985. Pet. App. 9. When the bank discovered the fraud, it discontinued petitioner's line of credit. Petitioner was ultimately convicted on two counts of falsely representing a number to be his social security number with the purpose of obtaining things of value from another, in violation of 42 U.S.C. 408(g)(2), and one count of bank fraud, in violation of 18 U.S.C. 1014. Admin. Rec. 93-96.

On March 11, 1986, after the discontinuance of his line of credit, petitioner attempted to pay a bill for convenience store supplies with a check for $1800.02 that he knew would be dishonored for insufficient funds. Pet. App. 17; Admin. Rec. 71, 77, 92. That act led to petitioner's conviction in a Texas court on April 21, 1987 for theft, in violation of Section 31.03(e)(4)(A) of the Texas Penal Code. Admin. Rec. 88-90.

2. The Immigration and Naturalization Service (INS) brought deportation proceedings against petitioner, charging him with deportability under Section

241(a)(1)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992), as a non-immigrant who had overstayed his visa.* Admin. Rec. 124-132. The INS also charged petitioner with deportability under Section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. IV 1992), which provides as follows:

> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

Petitioner admitted deportability under Section 241(a)(1)(B) based on the overstay (Admin. Rec. 42-43), but denied deportability under Section 241(a)(2)(A)(ii), arguing that all his federal and state convictions arose from "a single scheme of criminal misconduct" and therefore did not provide the predicate for deportation under that provision. Admin. Rec. 57-59. Petitioner also sought a continuance of the deportation proceedings, but he did not claim entitlement to relief from deportation under the Act. *Id.* at 41, 50-51, 54, 65.

The immigration judge (IJ) found that petitioner was deportable under both Section 241(a)(1)(B) and Section 241(a)(2)(A)(ii), and ordered that he be deported to the United Kingdom. Pet. App. 14-18; see App., *infra*, 1a (memorandum of oral decision finding

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* Section 241(a)(1)(B) of the Act provides, in pertinent part, that "[a]ny alien who * * * is in the United States in violation of this chapter or any other law of the United States is deportable." 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992).

petitioner deportable under both Sections). With regard to the charge based on petitioner's criminal convictions, the IJ "[found] it clear from the [state] indictment presented to which the [petitioner] has plead[ed] guilty that at the time he wrote checks on the account he knew that they would be returned not sufficient funds," because the bank had discontinued his credit. Pet. App. 17. The IJ therefore found "any relationship between the establishment of the [bank] account and the credit that it contained * * * [to be] sufficiently removed from [petitioner's] further action in writing checks * * * to sustain the charge of deportability as one convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." *Ibid.*

3. The Board of Immigration Appeals (BIA) affirmed the decision of the immigration judge. Pet. App. 5-13. The BIA observed that neither the text of Section 241(a)(2)(A)(ii) nor its legislative history defines the phrase "single scheme of criminal misconduct." Pet. App. 7-10. The BIA emphasized that it had "always interpreted" the statute to mean that, "when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct." *Id.* at 7-8 (citing, *inter alia*, *Matter of Adetiba*, Int. Dec. 3177 (B.I.A. 1992), and *Matter of D—*, 5 I. & N. Dec. 728 (B.I.A. 1954)). "Under this analysis," the BIA continued, "there would exist a single scheme of criminal misconduct where one crime constitutes a lesser offense of another, or where the two crimes flow from and are the natural consequences of a single act of criminal

misconduct." Pet. App. 8. The BIA acknowledged that "some circuit courts have adopted a more expansive view of what constitutes a single scheme," but it noted that the Fifth Circuit, where this case arose, has upheld its construction of Section 241(a)(2)(A)(ii). Pet. App. 8 (citing *Iredia* v. *INS*, 981 F.2d 847 (5th Cir.), cert. denied, 114 S. Ct. 203 (1993)).

Applying those principles to the instant case, the BIA concluded that petitioner's crimes were "separate and distinct" and did not arise out of a single scheme. Pet. App. 9. The BIA noted that petitioner "had already accomplished his goal of [the first crime], obtaining the financing for the land development and store," by the time his credit was terminated. Moreover, the BIA concluded, petitioner's "second offense is not a lesser included offense of the first, nor did it any way further the criminal enterprise of the first." *Ibid.* The BIA noted that petitioner "may have felt it necessary to write a bad check because he lost credit with the bank, but this act, 9 months after his previous fraudulent acts, was a separate criminal scheme. The bad check was in no way necessary to obtain the original financing." *Ibid.*

4. Petitioner sought review of his deportation order in the Fifth Circuit. He contended that the BIA's finding of deportability under Section 241(a)(2)(A)(ii) was not supported by substantial evidence, because his crimes resulted from a single scheme to use or attempt to use a single line of credit from the same financial institution. Pet. C.A. Br. 5-6. Petitioner did not argue that either the BIA's decision in *Adetiba* or the Fifth Circuit's precedent in *Iredia* was wrongly decided; rather, he contended that the BIA incorrectly applied *Adetiba* to his case

and that this case is distinguishable on its facts from *Iredia*. *Ibid.* In an unpublished decision, the Fifth Circuit sustained the BIA's decision, concluding that it was supported by substantial evidence. Pet. App. 1-2.

**ARGUMENT**

Petitioner correctly notes (Pet. 5-6) that there is disagreement among the courts of appeals as to the correct scope of a "single scheme of criminal misconduct," as that term is used in Section 241(a)(2)(A)(ii) of the Act. Compare *Akindemowo* v. *INS*, 61 F.3d 282 (4th Cir. 1995) (upholding BIA's interpretation); *Balogun* v. *INS*, 31 F.3d 8 (1st Cir. 1994) (same); *Iredia* v. *INS*, 981 F.2d 847 (5th Cir.) (same), cert. denied, 114 S. Ct. 203 (1993); and *Nguyen* v. *INS*, 991 F.2d 621 (10th Cir. 1993) (same), with *Gonzalez-Sandoval* v. *INS*, 910 F.2d 614, 616 (9th Cir. 1990) (disagreeing with First Circuit, and holding that offenses need not "take place at one time" to constitute a "single scheme"); *Nason* v. *INS*, 394 F.2d 223 (2d Cir.), cert. denied, 393 U.S. 830 (1968); and *Sawkow* v. *INS*, 314 F.2d 34 (3d Cir. 1963). That disagreement, however, does not provide a reason for this Court's review of the present case. First, petitioner conceded, and the IJ found, that petitioner is independently deportable on another ground. Second, even the courts of appeals that have disagreed with the BIA's construction of a "single scheme of criminal misconduct" and have applied a broader standard would have upheld the deportation order in this case (apart from the independent ground). Therefore, resolution of the conflict would not affect the outcome of this case.

1. Even if this Court were to agree with petitioner that the BIA erred in finding him deportable under Section 241(a)(2)(A)(ii) of the Act, he still would be deportable under Section 241(a)(1)(B) for having overstayed his nonimmigrant visa. The IJ found him deportable under Section 241(a)(1)(B), see App., *infra*, 1a, and petitioner conceded deportability on that ground at his deportation hearing. Admin. Rec. 42-43. Although the IJ's memorandum of oral decision, finding petitioner deportable under Section 241(a)(1)(B), states that it is "intended solely for the convenience of the parties," and that the transcribed and signed oral decision (which did not refer to deportation under Section 241(a)(1)(B)) would be the official decision and order in the case, it is clear that petitioner is deportable for having overstayed his visa, and that the result would be the same if the matter were resubmitted to the IJ for clarification of the decision on that ground. Nor did petitioner contend that he was eligible for statutory or discretionary relief from deportation. This case therefore presents an inappropriate vehicle for consideration by this Court of the scope of Section 241(a)(2)(A)(ii).

2. In addition, review is not warranted because petitioner's attempt to invoke the "single scheme" exception to deportability under Section 241(a)(2)(A)(ii) would fail even in those circuits that have read the statutory language somewhat more broadly than have the Fifth Circuit and the BIA. All three circuits that have articulated a broader interpretation have nonetheless stated that the passage of a substantial period of time between the commission of two offenses is sufficient to establish that those offenses are not part of a "single scheme"; they have held crimes to be part of a single scheme only when

the offenses were so closely linked in time that they probably were planned at the same time. If petitioner's case had arisen in those circuits, it is very likely that those courts of appeals would have ruled that the passage of time between petitioner's use of false social security numbers to obtain credit and his subsequent act of theft in writing a bad check was sufficient to uphold the BIA's conclusion that the two acts were not part of a single scheme.

The Ninth Circuit has held that crimes committed on different dates are presumed to be separate and distinct offenses not covered by the "single scheme" exception, unless the alien demonstrates that "the crimes were executed according to [a] considered plan." *Leon-Hernandez* v. *INS*, 926 F.2d 902, 905 (1991). The Ninth Circuit has also stated that, "[i]n the absence of all evidence to the contrary, completed crimes committed on differing dates or in differing places are considered separate and different crimes, and support separate charges." *Id.* at 904. Thus, in *Leon-Hernandez*, the Ninth Circuit rejected an alien's claim that his convictions on two counts of oral copulation with a minor fell within the "single scheme" exception of Section 241(a)(2)(A)(ii), notwithstanding that the criminal acts resulted from the alien's ongoing, unlawful relationship with the minor. 926 F.2d at 904-905. Because the alien had not definitely intended to commit the second sexual offense when he committed the first, the Ninth Circuit held that the BIA's finding of deportability was reasonable. *Id.* at 905. Cf. *Gonzalez-Sandoval*, *supra* (finding that two robberies committed two days apart against same bank constituted a "single scheme").

Decisions of the Second and Third Circuits are to the same effect. In *Nason*, the Second Circuit upheld the BIA's conclusion that "two periods of mail fraud activity separated by an interval of over nine months" did not constitute a single scheme of criminal misconduct. 394 F.2d at 225. The court observed that, notwithstanding "the basic similarity between the two crimes" (*ibid.*), the two episodes of criminal activity were not part of the same scheme because the "interlude between the first and second periods of criminal activity was not anticipated * * * [and] [p]etitioner terminated his first period of criminal activity simply because he had acquired all he wanted." *Id.* at 226. Here, too, petitioner's second criminal episode, the writing of a bad check, was not anticipated at the beginning; it was undertaken only after petitioner's first criminal action, the fraudulent securing of a line of credit, came to an end, and it constituted a new criminal undertaking. As the Second Circuit remarked, "Congress intended [the] restriction to operate so that a one-time alien offender would be afforded a second chance before he could be deported. * * * Congress meant to give the alien a second chance, not to spare the recidivist." *Id.* at 227.

By contrast, the Third Circuit concluded that "the receipt of a stolen motor vehicle on July 17, 1958, and the theft of another vehicle belonging to a different person on the following day" in the same city constituted a single scheme of criminal misconduct within the meaning of Section 241(a)(2)(A)(ii). *Sawkow*, 314 F.2d at 38. The court acknowledged that "the inference to be drawn from different crimes committed at different times against different persons is that they were separate and distinct unless

there is evidence to the contrary," but it found that inference inapplicable to the case before it, because, "[f]or all we know * * * these crimes may have been perpetrated within a few minutes of each other." *Ibid.* Because this case does involve "different crimes committed at different times against different persons," the Third Circuit would have upheld the BIA's conclusion that petitioner was deportable.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

FRANK W. HUNGER
*Assistant Attorney General*

RICHARD M. EVANS
TERRI J. LAVI
*Attorneys*

SEPTEMBER 1995

**APPENDIX**

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge
Dallas, Texas

| | | |
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| In the Matter of: | ) | File A28 394 538 |
| | ) | |
| | ) | |
| Aidan Alastair | ) | |
| Robertson-Aikman | ) | |
| | ) | |
| | ) | |
| | ) | In Deportation |
| Respondent(s) | ) | Proceedings |

Memorandum of Oral Decision

This is a summary of the Oral Decision and Order issued today intended solely for the convenience of the parties. In the event of review the transcribed and signed Oral Decision is the official decision and order in this case.

Respondent was/found deportable under Section 241(a)(1)(B) & § 241(a)(2)(A)(ii) of the Immigration and Nationality Act of 1952 as amended.

Respondent applied for the relief of _____ which was granted/denied.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent was granted Voluntary Departure on or before _____ with an alternative Order of Deportation to _____ or _____

Respondent was ordered deported to the United Kingdom or _____

Appeal was /reserved by /Respondent. Any appeal is due by February 10, 1994

DATE: January 31, 1994

PLACE: Dallas, Texas

/s/ Gary Burkholder
Gary Burkholder
Immigration Judge